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No. 02-1794

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

MANUEL FLORES-MONTANO

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In opposing certiorari, respondent argues that the Ninth Circuit correctly held that customs officers at the border must have reasonable suspicion before searching a vehicle by removing and disassembling the vehicle's gas tank. He contends that other courts of appeals' decisions support that ruling. And he argues that the holding does not jeopardize the government's ability to protect the Nation's borders.

None of those arguments is sound. A constitutional holding that strips customs officers of the authority given by Congress to protect the Nation's borders from the illegal entry of contraband, persons, and harmful substances clearly merits this Court's attention. This Court's decisions support the government's authority to conduct a gas-tank disassembly without reasonable suspicion and no circuit has held to the contrary. And the court of appeals' holding has a significant and ad-

verse effect on law enforcement at the border. This Court's review is therefore warranted.

A. The Ninth Circuit's Decision Is Inconsistent With This Court's Decisions That Recognize The Broad Power Of Customs Officers To Conduct Suspicionless Searches Of Items At The Border

Respondent argues that the Ninth Circuit's decision accords with the principle recognized in *United States* v. *Montoya de Hernandez*, 473 U.S. 531, 538 (1985), that "[r]outine searches of the persons and effects of entrants [at the border] are not subject to any requirement of reasonable suspicion, probable cause, or warrant," because, in his view, a gas tank search is nonroutine. Br. in Opp. 13-18. That position, however, conflicts with this Court's border search jurisprudence, which has consistently recognized the broad authority of customs officers to conduct suspicionless searches in order to safeguard the unique interest of the Nation in preventing the unlawful entry of persons and effects into this country. *Montoya de Hernandez*, 473 U.S. at 537; *United States* v. *Villamonte-Marquez*, 462 U.S. 579, 584-585 (1983); *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977); *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 272 (1973); *Boyd* v. *United States*, 116 U.S. 616, 623 (1886).

Since the founding of this country, Congress has given customs officers plenary authority to conduct searches at the border, Pet. 8-11, and that authority continues to be conferred by 19 U.S.C. 1581(a), which provides that customs officers "may at any time [to] go on board of any vessel or vehicle * * * and examine, inspect, and search the vessel or vehicle *and every part thereof* * * * and to this end may hail and stop such vessel or vehicle, and use all necessary force to compel

compliance." Thus, "[d]uring virtually the entire history of our country—whether contraband was transported in a horse-drawn carriage, a 1921 roadster, or a modern automobile—it has been assumed that a lawful search of a vehicle would include a search of any container that might conceal the object of the search." *United States* v. *Ross*, 456 U.S. 798, 820 n.26 (1982).

The plenary authority of customs officers to conduct border searches extends to the removal and disassembly of a vehicle's gas tank, a large and commonly used container for smuggling contraband and persons across the border. Pet. 17-18. In arguing that such searches are nonroutine, respondent erroneously equates (Br. in Opp. 12) such searches with the level of intrusiveness associated with the monitoring of a traveler's bowel movements involved in *Montoya de Hernandez*, 473 U.S. at 534-535, or the other nonroutine searches of the person identified in that decision, *i.e.*, "strip, body-cavity, or involuntary x-ray searches." *Id.* at 541 n.4. A gas tank search involves no similar exceptional intrusion on the vehicle's owner or its passengers. As explained in the petition, the removal, disassembly, and reassembly of a gas tank is a quick procedure that involves no permanent destruction of property and no interference with the safe operation of the tank or the vehicle. Pet. 13; see Pet. App. 8a (Declaration of J. Pesayco) ("The straps were undone, some bolts were unscrewed, and some hoses were disconnected. Nothing was permanently altered and nothing was damaged. * * * The gas tank could have been reconnected without damaging it or the vehicle.").

Respondent argues (Br. in Opp. 15) that a gas tank search is "highly intrusive" because there is delay occasioned by Custom's policy to contact a qualified mechanic to remove the tank from the vehicle. The pres-

ence of a mechanic to assist in a search of a vehicle, however, poses no intrusion on the vehicle's owner or passengers. There is also no lengthy or unreasonable delay associated with waiting for the arrival of a mechanic to safely remove the gas tank. See Pet. App. 7a (Declaration of J. Pesayco) (approximately 20-30 minute delay); *United States* v. *Molina-Tarazon*, 279 F.3d 709, 712 (9th Cir. 2002) (mechanic arrived within 15-20 minutes). Many inspections at the border may involve specially trained personnel or some incidental delay without converting the inspection into a nonroutine or highly intrusive event.

Nor does significant delay accompany the actual procedure, which in this case was completed within 15 to 25 minutes. Pet. App. 7a-8a. Although respondent faults (Br. in Opp. 16) the record for not containing specific statistics on the reassembly and reattachment of a gas tank where no contraband is found, there is no reason to believe that such a procedure entails lengthy delays. See Pet. App. 8a (Declaration of J. Pesayco) ("It was easy to disconnect the gas tank, and it would have been easy to connect it back again.").

Reiterating the Ninth Circuit's reasoning of *United States* v. *Molina-Tarazon*, 279 F.3d 709, 713 (2002), respondent also asserts that a gas tank search poses a risk of danger to the driver and passengers and is accompanied by fear. But respondent offers no more support for his contention than the pure speculation of the court in *Molina-Tarazon*, 279 F.3d at 713-716. And while overstating the purported intrusiveness of the commonplace mechanical procedure at issue in this case, respondent, like the court of appeals, gives insufficient weight to the strong interest of the government in preventing and detecting the smuggling across the border. Gas tanks are large opaque containers that commonly conceal the smuggling of illicit substances or aliens. The ability to conduct searches of such containers, without having to be able to satisfy a court in a later proceeding that reasonable suspicion existed, furthers the protective mission of United States officers at the border. That national interest outweighs the limited intrusion on the individual whose vehicle is subject to a search that does not affect the gas tank's safety or workability.

Respondent also is incorrect in suggesting that the government seeks the authority for customs officers to "order a car disassembled down to the last o-ring, and hand it back to the owner in a large box." Br. in Opp. 14 (quoting *Molina-Tarazon*, 279 F.3d at 713). Rather, the government contends that the removal, disassembly, and reassembly of a vehicle's *gas tank*, in order to detect a primary method of smuggling, is either a routine border search requiring no level of suspicion (Pet. 8-13) or, even assuming the procedure is nonroutine, may be conducted without suspicion given a balance of the competing interests at stake (Pet. 15-16). A gas tank is one of the few "containers" in a vehicle that is closed to visual inspection without being removed and that could be (and is) used to smuggle illegal items and persons.

B. No Court of Appeals Has Adopted The Ninth Circuit's Reasonable Suspicion Requirement For Gas Tank Searches

Respondent argues that the government's position is contrary to appellate decisions holding that officers at the border need reasonable suspicion to conduct a nonroutine search of property. Br. in Opp. 8, 10-13 (citing *United States* v. *Rivas*, 157 F.3d 364, 368 (5th Cir. 1998); *United States* v. *Robles*, 45 F.3d 1, 5 (1st Cir.), cert. denied, 514 U.S. 1043 (1995); *United States* v. *Car-*

reon, 872 F.2d 1436, 1441 (10th Cir. 1989)). Those cases are inapposite. Each of those decisions involved the intentional use of damaging force in the inspection of property, specifically, drilling into solid objects. *Rivas*, 157 F.3d at 366 (drilling into the frame of an ostensibly empty auto-transport trailer); *Robles*; 45 F.3d at 3 (drilling of a one inch hole into the center of a metal cylinder); *Carreon*, 872 F.2d at 1437-1438 (drilling a small hole in the camper shell of a pick-up truck). None of those decisions holds, much less suggests, that customs officers need reasonable suspicion to remove and disassemble a vehicle's gas tank in a manner that involves no intentional destruction of property.*

For similar reasons, respondent also errs (Br. in Opp. 9-11, 21-22) in suggesting that the decisions of *Rivas*, *Robles*, and *Carreon* have long limited the ability of customs officers to conduct gas tank searches at the border. Customs authorities have advised that officers regularly conduct gas tank searches involving the disassembly of a gas tank at border locations within the First, Fifth, and Tenth Circuits, and that those searches have proceeded on the assumption that no level of suspicion is required.

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* The hammering off of the bondo from the gas tank is not comparable to drilling a hole into a vehicle or other object. Bondo is a putty-like hardening substance that is used as a sealant. Pet. 3. Its removal is comparable to cutting the string that ties a package or to pulling off a strip of packing tape. "[N]ew bondo could easily have been applied." Pet. App. 8a (Declaration of J. Pesayco).

C. A Requirement of Reasonable Suspicion Threatens To Impair The Government's Ability To Protect The Nation's Border

1. The Ninth Circuit's invalidation of the government's statutory authority to conduct suspicionless gas tank searches at the border warrants this Court's review not only because it is incorrect, but also because it impinges on an important authority to protect the Nation's international borders. "Gas tanks have been and continue to be the primary concealment area used to smuggle and hide drugs in vehicles," Pet. App. 12a (Declaration of J. Ahern), and gas tanks are regularly used for the smuggling of persons, Pet. 17-18.

Respondent seeks to diminish the significance of the question presented by arguing that the government has not demonstrated that customs or immigration inspectors regularly conduct suspicionless gas tank searches. Br. in Opp. 19-20. The ability of the government to conduct gas tank searches at the border, without reasonable suspicion, however, is critical to the government's ability to deter and detect smuggling in gas tanks. The existence of broad authority to conduct searches of gas tanks provides strong deterrence to potential smugglers who "would believe that gas tanks and other compartments, *as with other areas in a vehicle*, could be searched randomly and with no level of suspicion." Pet. App. 12a-13a (Declaration of J. Ahern) (emphasis added). By imposing a reasonable suspicion requirement for gas tank searches, when no such requirement exists to disassemble and search other opaque or locked vehicular compartments (such as luggage, trunks, glove compartments), the Ninth Circuit's decision poses a serious risk of actually encouraging smuggling through the use of gas tanks. Pet. 18-19.

Respondent does not dispute the government's submission that a requirement of reasonable suspicion could lead to fewer gas tank compartment area searches. Pet. 18-19. The Ninth Circuit's decision may chill officers from conducting gas tank searches when those officers believe that their grounds for suspicion may not pass muster with the courts. Cf. *Rivas.*, 157 F.3d at 368 (dog's "casting" in presence of vehicle did not provide reasonable suspicion to conduct search). Officers may also fear personal liability should a court later determine that the officers lacked reasonable suspicion. Given the extent to which alien and drug smuggling already routinely occurs in gas tanks, a decrease in gas tank searches, coupled with the lack of deterrence created by the authority to conduct suspicionless gas tank searches, significantly threatens the government's ability to detect the illegal entry of unwanted persons and things into this country.

2. Respondent suggests that customs officers may attempt to minimize the serious loss to border security caused by the Ninth Circuit's decision by using other alternatives to the removal and disassembly of the gas tank, such as dog screens, gas-tank tapping, visual inspections, and fiber optic scopes in order to detect the presence of contraband. Br. in Opp. 20-21. But none of those procedures is infallible, and they may not be as effective as the actual removal and disassembly of the tank itself, especially for the detection of alien smuggling. See *Molina-Tarazon*, 279 F.3d at 711-712 (noting failure of narcotics-trained dog to alert despite presence of marijuana in gas tank and blockage of fiber-optic scope by anti-siphoning valve in gas tank).

Respondent's contention also fails at a more fundamental level. This Court repeatedly has rejected the contention that the Fourth Amendment requires an ex-

amination into whether the government may employ less intrusive means to accomplish its objectives. *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 350 (2001) ("a least-restrictive-alternative limitation * * * is * * * one of those * * * rules generally thought inappropriate in working out Fourth Amendment protection" (citation omitted)); *Skinner* v. *Railway Labor Executives' Assn.*, 489 U.S. 602, 629 n.9 (1989) (refusing to consider "a list of less drastic and equally effective means of addressing the Government's concerns") (internal quotation marks omitted); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556-557, n.12 (1976) ("The logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."). Such inquiry also would be particularly inappropriate in the border security context, where the government's interest is at its apex. Because the Ninth Circuit's decision significantly impairs that interest and nullifies on constitutional grounds the statutory authority of customs officers to use an important tool to combat smuggling, this Court's review is warranted.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

SEPTEMBER 2003